

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs December 16, 2008

**STATE OF TENNESSEE v. JAMES WRIGHT FREELS**

**Direct Appeal from the Criminal Court for Anderson County  
No. A6CR0203    Jon Kerry Blackwood, Judge**

---

**No. E2008-01198-CCA-R3-CD - Filed December 4, 2009**

---

Defendant, James Wright Freels, was indicted in count one of the indictment for sexual battery by an authority figure, a Class C felony, and in count two for incest, a Class C felony. Pursuant to the terms of a negotiated plea agreement, Defendant entered a plea of guilty to incest in count two of the indictment with the length and manner of service to be determined by the trial court. The state agreed to enter a nolo prosequi as to count one. Following a sentencing hearing, the trial court denied Defendant's request for judicial diversion. The trial court sentenced Defendant as a Range I, standard offender, to three years, with thirty days to be served in the county jail, and the remainder of Defendant's sentence suspended and Defendant placed on supervised probation. On appeal, Defendant challenges the trial court's denial of his request for judicial diversion. After a thorough review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Kevin C. Angel and Lauren R. Biloski, Oak Ridge, Tennessee, for the appellant, James Wright Freels.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; David S. Clark, District Attorney General; and Sandra N. Donaghy, Assistant District Attorney General, for the appellee, the State of Tennessee.

**OPINION**

**I. Background**

The minor victim will be referred to by her initials. At the guilty plea submission hearing, the State entered the following factual basis in support of Defendant's plea of guilty:

Your Honor, this is according to the investigation done by Danielle Duncan of the Anderson County Sheriff's Department and in cooperation with the Department of Children[']s Services. They interviewed the minor child, [K.F.], who is the daughter of [Defendant]. They asked [K.F.] to give information as to what happened between she [sic] and [Defendant]. The child indicated there were three separate sets of events. The first time was when she was eight or nine years old, and she was in her bedroom. [Defendant] came in and sat down on the bed next to her. She said that when he sat down, his penis fell out of his boxer shorts; that he told her she could touch it and then made her touch it.

She said that he grabbed her hand when she tried to pull away. When she tried to pull her hand away, he pulled her hand closer and that frightened her. She confronted [Defendant] in the presence of her mother. At that time, the mother sort of dealt with it by questioning [Defendant] and trying to get the family into some sort of treatment.

Well, when this child was in eighth grade, she indicated that she was in school the week before spring break on the weekend, and it was in the morning, she was sitting in the recliner with [Defendant]. They were in the living room, and she had her pajamas on. She was sitting in his lap. At that time she said she could not remember if her mother was home but [Defendant] said that he told her that he thought she wanted him to do something to her. At that time he told her that he did things to her when she was younger, but she did not remember him doing anything. That they were both to blame.

At that point, he put his finger inside of her pants. She had both [sic] underwear on. He asked her if it felt good, and she told him that it did. This occurred for five-to-ten [sic] minutes. She was not certain that his finger went inside of her and he stopped.

A third incident happened which is when they were sitting on the stairs. She said that that happened after dinner and that it was on a school night. She stated – using her language – that he licked her boobs, french kissed her, and then tried to finger her. She said she had on blue jeans, and she did not let him finger her that time. She asked to go. She referred to these incidents as occurring in first grade and up until she disclosed the date of this event as March of 2005. This conduct happened in Anderson County, Tennessee.

At the sentencing hearing, Danielle Duncan with the Anderson County Sheriff's Office testified that Defendant came to the sheriff's office at approximately 8:00 a.m. one morning and asked to speak to Detective Duncan "about [a] child abuse situation." Detective Duncan said that Defendant admitted to two incidents of fondling, kissing, and touching his fourteen-year-old daughter. Defendant's description of the events indicated that he had penetrated the victim with his

finger. Defendant said that the Department of Children's Services had contacted him the night before about the allegations and that he had come to the sheriff's department because "he felt it was the right thing to do."

Detective Duncan interviewed Defendant's three children at Clinton High School. The eldest daughter had just turned eighteen, and the twins, a boy and K.F., were nearly fifteen years old. K.F. told Detective Duncan about the events which Defendant had described. K.F. said that Defendant forced her to touch his penis when she was eight or nine years old. Detective Duncan said that when Defendant described this particular incident, he said that "it was basically an accident something an inquisitive eight-year-old did." K.F. told Detective Duncan that she believed that she was forced to touch Defendant's penis.

On cross-examination, Detective Duncan stated that her interviews with Defendant's children did not reveal any incidents of sexual abuse except for those involving K.F. Detective Duncan said that she was not aware that Defendant had already registered as a sexual offender. Detective Duncan said that she believed that Defendant was remorseful during the interview.

Karen Orsulack with the Board of Probation and Parole prepared Defendant's presentence report which was introduced as an exhibit at the hearing. Ms. Orsulack said that Sharon Freels, Defendant's former wife, did not want her to interview K.F., and Ms. Freels prepared K.F.'s impact statement on behalf of K.F. Ms. Orsulack said that Ms. Freels reported that Defendant's offenses greatly affected the family's finances. Ms. Freels stated that Defendant continued to help with the family's bills in addition to paying Ms. Freels \$1,400 each month in child support. Ms. Freels said that she sold property and household items in order to pay attorney's fees and that her house is currently for sale.

Ms. Orsulack stated that Defendant has a bachelor's degree in math, physics and chemistry and was employed by Y-12 in Oak Ridge as an engineer for approximately twenty years. Ms. Orsulack said that Defendant currently worked for a retail outlet in Knoxville stocking shelves during the night shift. Defendant reported that he had seen a therapist for depression and suicidal thoughts during the pendency of his sentencing hearing. Ms. Orsulack said that Defendant passed a polygraph test which Ms. Orsulack considered a "good sign" that Defendant was "ready for treatment." Ms. Orsulack acknowledged that Defendant had been cooperative and remorseful during the interview process. Ms. Orsulack stated that all of the family, including K.F., supported the grant of judicial diversion or probation.

William M. Tillery, a licensed clinical social worker, owns Psychological & Counseling Services in Maryville which treats adolescent and adult sex offenders. Mr. Tillery testified that Defendant was referred to him by the Board of Probation and Parole for a psycho-sexual evaluation for dangerousness. Mr. Tillery stated that the evaluation was designed to test the amenability of an offender to treatment. Mr. Tillery said that he first completed a sexual adjustment inventory and then interviewed Defendant for approximately one hour. Mr. Tillery stated that Defendant was generally cooperative, and the sexual adjustment inventory rated Defendant as a low risk for lying in terms of

general truthfulness. Mr. Tillery said, however, on sexually-related items, Defendant ranked in the seventy-third percentile for truthfulness which was consistent with Defendant's denial of responsibility "for sexualized thinking regarding children or other types of sexualized problems." Mr. Tillery stated:

[i]n his own writing in drawing up his responsibility form, he did not mention that he touched both the breasts and the vaginal area. So I think he's not really accepted the fact that he did something that will harm his daughter forever, that will make her feel responsible for breaking up a family, and some of those issues that offenders really need to take a hardcore look at.

Mr. Tillery said that Defendant initially met with a group before the interview process started which caused Defendant to feel uncomfortable. Mr. Tillery stated that this indicated Defendant's dislike of being identified as a sex offender and his disinterest in treatment. Mr. Tillery said in Defendant's mind, Defendant "was just stupid, and there would never, ever, ever be any more problems." Mr. Tillery said that Defendant displayed a significant number of cognitive distortions about children and sex. During his evaluation, Defendant agreed or strongly agreed with such statements as "some children can act very seductively," "sometimes victims initiate sexual activity," "during sexual assaults on children, some men ask their victims if they like it because they really want to please the child and make them feel good," and "some young children are more adult-like than other children." In his report, Mr. Tillery observed that "[t]hese cognitive distortions are thinking errors which could give [Defendant] permission to have sexual contact with children."

On cross-examination, Mr. Tillery acknowledged that all of the cognitive distortions displayed by Defendant during the testing process could be addressed during treatment. Mr. Tillery said that he found no other evidence during the evaluation of child sexual abuse other than the current offenses.

K.F. made a statement to the court. K.F. said that the past few years had been hard on the family, but she would not forgive herself if something happened to her father. K.F. expressed dissatisfaction with the plea bargain process. K.F. stated:

I'm not sitting here saying that my dad should be full-fledged punished, because I've never been a vengeful person. I want to get to the point where I can forgive him, but I have a lot of mixed emotions about it. But I want what's best for my family.

Ms. Freels testified that the family saw a psychologist after Defendant inappropriately touched K.F. when she was eight years old. Ms. Freels said that "apparently [K.F.] had seen his penis and was curious about it," and the psychologist said that Ms. Freels had handled the situation properly. Ms. Freels stated that Defendant did not touch K.F. inappropriately again until she was fourteen years old. Ms. Freels immediately sought help for the family when she learned of the abuse approximately one year later and filed for divorce to protect the children. Ms. Freels said that her main concern was not financial. Ms. Freels stated that she worked as a receptionist at a local bank

and received good health benefits. Ms. Freels said that she and her older daughter were cancer survivors, and her son was autistic and had bipolar disorder. Ms. Freels said that Defendant helped pay for their needs, including the mortgage payment, and Ms. Freels would not be able to continue financially without Defendant's help.

On cross-examination, Ms. Freels said that Defendant accepted the fact that he could not see his minor children. Ms. Freels said that they "did mess up one time" when her son became upset, and Defendant was the only one who could calm him. Ms. Freels acknowledged that Defendant saw his oldest daughter and that Defendant helped her with her college courses.

Defendant testified on his own behalf. Defendant stated that he went to the sheriff's department because he realized that he had committed a crime. Defendant said that he did not oppose either the juvenile court's order barring him from access to his minor children or the divorce. Defendant said that he paid child support and one-half of the medical bills not covered by insurance. Defendant said that he also paid one-half of special items as needed. Defendant stated that his two younger children were collecting social security benefits which he believed would terminate if he were incarcerated.

Defendant said that after he left Y-12 in 1986, he went to work for a company that built medical diagnostic equipment. Defendant said that he and other employees were laid off from the company in 2003. Defendant said that he understood that he would have to participate in group therapy and be monitored by a polygraph during his probationary period. Defendant said that incarceration would hinder his ability to provide for his family financially. Defendant stated that he continued to pay the same amount of child support even though his oldest daughter was now nineteen. Defendant made the following statement:

I am very sorry for what I've put you through. I have no ill feelings toward you, [K.F.]. You only did what your mother and I taught you [and your siblings]. You did what we told you to do. I cannot fault you for that at all. I am sorry that it happened. I'll spend the rest of my life trying to make it up to you. I love all of my family.

At the conclusion of his direct examination, Defendant asked the court to take into consideration the fact that he was "remorseful about everything."

On cross-examination, Defendant acknowledged that he believed he should be punished for committing the offenses. Defendant stated that he spent his free time helping his oldest daughter with her college courses, either at the school or at his apartment. Defendant said that he would "never do anything sexually to her." Defendant said that he had the "utmost respect" for his oldest daughter. Defendant stated that his sexual conduct toward K.F. was not premeditated.

The trial court found that Defendant was statutorily eligible for judicial diversion. The trial court found as factors weighing in favor of the grant of judicial diversion Defendant's social history,

his employment history, his education, and the lack of a criminal history. The trial court found that deterrence was not “a factor that should play any part” in its sentencing determinations.

The trial court found that the egregious nature of the offenses weighed against the grant of judicial diversion. The trial court also considered the degree to which Defendant accepted responsibility for his conduct. The trial court noted Defendant’s voluntary confession but observed that his decision to report his conduct could be viewed as “trying to beat out the fire before the fire got too hot.” The trial court stated:

I guess the whole issue about that is the credibility of [Defendant] and his amenability to treatment. I’ve listened to the testimony of Dr. Tillery, and I’ve listened to the testimony of [Defendant]. And I’ve listened to the doctor give his explanation about the statements that cause the Court concern that seem to indicate that [Defendant], while being truthful on many matters[,] is not truthful on the issue of sexual activities regarding his child. But the most important statement here today is the statement that [Defendant] made that he has no ill feelings toward [K.F.]. And I understand the interpretation of that statement by [defense counsel] but I take it another way. I take it as a statement of a person who really has not taken responsibility; I take it as a person who sees K.F. as: You got me in trouble, but I’m not going to hold you accountable for getting me into trouble for my own conduct. Now what does that tell the Court? That tells the Court that until [Defendant] confronts those feelings, he’s not amenable to rehabilitation.

The trial court found that the egregious nature of the offenses and Defendant’s lack of amenability to rehabilitation outweighed those factors favoring diversion. The trial court found that judicial diversion was not appropriate and would not serve the ends of justice.

## **II. Denial of Request for Judicial Diversion**

Defendant argues that the trial court erred in denying his request for judicial diversion based solely on its misinterpretation of Defendant’s apology to K.F. during his direct examination. Defendant points out that Detective Duncan and Ms. Orsulack testified that they believed Defendant was remorseful over his conduct toward K.F. Despite his concerns, Mr. Tillery stated that he felt that Defendant “could be managed” through therapy, and Defendant expressed his willingness to follow all conditions of his judicial diversion. Defendant submits that both K.F. and Ms. Freels expressed their desire for Defendant to be granted judicial diversion. Other than the one statement to K.F., Defendant contends that the record does not support the trial court’s finding that Defendant was not amenable to rehabilitation. Defendant also submits that the trial court failed to state on the record the reasons why the factors unfavorable to diversion outweighed those factors which were favorable.

A defendant is eligible for judicial diversion if he or she is convicted of a Class C, D, or E felony or lesser crime and has not previously been convicted of a felony or a Class A misdemeanor.

See T.C.A. § 40-35-313(a)(1)(B)(i). Judicial diversion allows the trial court to defer further proceedings without entering a judgment of guilt and to place the defendant on probation under reasonable conditions. Id. § 40-35-313(a)(1)(A). When the probationary period expires, if the defendant has completed probation successfully, the trial court will dismiss the proceedings against the defendant with no adjudication of guilt. See id. § 40-35-313(a)(2). The defendant may then apply to have all records of the proceedings expunged from the official records. See id. § 40-35-313(b). A person granted judicial diversion is not convicted of an offense because a judgment of guilt is never entered. See id. § 40-35-313(a)(1)(A).

When a defendant challenges the manner of serving a sentence, this court conducts a de novo review of the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” Id. § 40-35-401(d). However, when the defendant challenges the trial court’s denial of a request for judicial diversion, a different standard of appellate review applies. Because the decision to grant judicial diversion lies within the sound discretion of the trial court, this court will not disturb that decision on appeal absent an abuse of discretion. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). Upon review, we will give the trial court the benefit of its discretion if “any substantial evidence to support the refusal’ exists in the record.” State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992) (quoting State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983)).

In determining whether to grant judicial diversion, the trial court must consider (1) the defendant’s amenability to correction; (2) the circumstances of the offense; (3) the defendant’s criminal record; (4) the defendant’s social history; (5) the defendant’s physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the ends of justice. Electroplating, Inc., 990 S.W.2d at 229; State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). In addition, “the record must reflect that the court has weighed all of the factors in reaching its determination.” Electroplating, Inc., 990 S.W.2d at 229. If the trial court refused to grant judicial diversion, it should state in the record “the specific reasons for its determinations.” Parker, 932 S.W.2d at 958-59.

The record shows that the trial court considered all of the factors relevant to judicial diversion. Despite the fact that Defendant’s personal history reflected favorably toward the grant of judicial diversion, the trial court found that the circumstances of the offense were egregious, stating that it could not “think of anything that could be worse than abusing your own child.” See State v. Kyte, 874 S.W.2d 631, 634 (Tenn. Crim. App. 1993) (observing that the nature and circumstances of an offense alone may support a denial of judicial diversion). The legislature chose not to include the offense of incest as one of the “sexual offenses” that precludes consideration of judicial diversion. T.C.A. § 40-35-313(a)(1)(B)(ii). To deny judicial diversion solely on the fact that Defendant entered a plea of guilty to incest would be contrary to legislative intent. However, the underlying facts of the offenses committed by Defendant do justify a denial of judicial diversion, even those facts related to an offense for which Defendant was not convicted, in this case, sexual battery by an authority figure. See State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000) (In

sentencing, the trial court may consider facts which underly a criminal charge for which there has been an acquittal).

Also, Defendant's failure to accept responsibility for the offenses, which reflected poorly on his amenability to rehabilitation, was of significant concern to the trial court. The trial court also observed that Mr. Tillery found that Defendant had not been truthful about the extent of the abuse of K.F. or the effect that abuse had on her. Although Defendant considers the trial court's interpretation of his in-court apology to K.F. to be distorted, the trial court was in a better position to assess Defendant's sincerity and attitude. See Electroplating, Inc., 990 S.W.2d at 229 (denial of judicial diversion warranted not only by the circumstances of the offense, but also by the defendant's failure to accept responsibility for the offense); Anderson, 857 S.W.2d at 574 (observing that the trial court is in the better possession to assess a defendant's sincerity in accepting responsibility for the offense which is a relevant factor in determining his or her amenability to rehabilitation); State v. Nease, 713 S.W.2d 90, 92 (Tenn. Crim. App. 1986) (holding that a defendant's failure to be completely truthful about the circumstances of the crime committed and to take full responsibility made the defendant a poor candidate for diversion).

Based on our review of the record, we conclude that the trial court adequately explained its reasons for denying Defendant's request for judicial diversion. The record contains substantial evidence to support the trial court's determination based on Defendant's lack of amenability to rehabilitation, and we discern no abuse of discretion. Defendant is not entitled to relief on this issue.

### **CONCLUSION**

After a thorough review, we affirm the trial court's denial of Defendant's request for judicial diversion.

---

THOMAS T. WOODALL, JUDGE